No. 80-1183

APR 8 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSISSIPPI,
Appellant,

v.

WILLIAM FRENCH SMITH, Attorney General, and
UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Dated: April 8, 1981

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The Government has taken a position in its Motion to Affirm that, if upheld, will make "the sacrifices of entering government service . . . too great for most men to make." *United States v. Standard Oil Co. (New Jersey)*, 136 F.Supp. 345, 363 (S.D.N.Y. 1955). The Government states:

> The issue before the Attorney General in both 1970 and 1979, and the issue in this litigation, is whether the open primary system has the purpose or will have the effect of "denying or abridging the right to vote on account of race or color," within the meaning of Section 5 of the Voting Rights Act. Jerris Leonard was substantially involved in the

> Justice Department's consideration of that matter in 1970, and his involvement then should preclude his representation of Mississippi now.

Motion to Affirm at 8. Adopting this approach to the disqualification of former government attorneys will impair both the client's ability to retain counsel of its choice and the government's ability to attract non-career attorneys.

By defining the "matter" on which disqualification is based as dilution of black voting strength, the Government seeks to equate the 1979 submission by the State of Mississippi, which is at issue in this case, with the 1970 submission considered by Mississippi's attorney, Jerris Leonard, while he was Assistant Attorney General for Civil Rights. This broad interpretation of "matter" "will prevent [an attorney] from engaging in practice of the very specialty for which the government sought his service." *United States v. Standard Oil Co. (New Jersey)*, 136 F.Supp. at 363. This cannot be the intended or the desired result of the laws prohibiting conflicts of interest.

Properly framed, the issue before the three-judge court below is whether Mississippi's 1979 submission has the "effect" or "purpose" "of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

"Effect" can be determined only by comparing the predicted results of implementing the requested change in election procedures with the present position of racial minorities. *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). That determination can be made only by examining the relative political status

of black Mississippians *today*.[1] Regardless of the similarity or dissimilarity of the 1970 and 1979 statutes, Mr. Leonard could not have examined in 1970 the effect that legislation passed in 1979 would have on black voting strength in 1981.[2]

"Purpose," like "effect," must be determined in the present, not in the past. *See City of Richmond v. United States*, 422 U.S. 358, 375 (1975) (emphasis added) ("the controlling factor in this case is whether there are *now* objectively verifiable, legitimate reasons for the annexation").

Under the law of Mississippi, the legislature that passed the 1979 law at issue in this case is not the same as that which passed the 1970 law. Miss. Const. § 36. The legislative purpose in passing the laws could have been entirely different, even if the language of both the 1970 and the 1979 laws had been identical.[3] In any

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[1] The Government concedes that the district court will have to consider "current conditions" in evaluating the 1979 submission. Motion to Affirm at 9.

[2] The Government uses an ill-chosen analogy to attempt to illustrate its position. The Government presents a situation in which a former prosecutor seeks to represent a defendant when that defendant is retried for the same offense for which he was tried originally by the former prosecutor. The only change is the unavailability of a witness. Motion to Affirm at 9. No one can dispute that the first and second trials are the same matter because the defendant is being tried for the same crime. *See* ABA Code of Professional Responsibility, DR 9-101(B). However, if the former prosecutor tried the defendant for robbing a bank in 1970, there is nothing to prevent that same attorney from representing the same defendant charged with robbing the same bank in 1979. The matters are different.

[3] Contrary to the Government's representation, Motion to Affirm at 6, Mississippi does not concede that the 1970 and 1979 laws "would establish the identical open primary system," *id.*, but states in its Jurisdictional Statement that the two laws are "different." Jurisdictional Statement at 6. In any event, the similarity between the 1970 and 1979 submissions is not determinative.

event, Mississippi's purpose in passing the law reviewed by Mr. Leonard while he was the Assistant Attorney General for Civil Rights is, at best, weak circumstantial evidence of a different legislature's purpose 10 years later in passing the present law.[4] Thus, Mr. Leonard's former position at the Justice Department gives him neither an advantage nor the appearance of an advantage in his current representation of Mississippi.[5]

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[4] Time has brought about great changes in Mississippi's politics. *See* Jurisdictional Statement at 7. The passage of time brings this case within the principles announced in *Control Data Corp. v. IBM Corp.*, 318 F.Supp. 145, 147 (D. Minn.), *aff'd*, 430 F.2d 1277 (8th Cir. 1970), in which the court refused to disqualify a former Justice Department attorney from representing IBM despite the attorney's prior participation in the Justice Department's antitrust investigation of IBM some 15 years previously. The court refused to disqualify the former Justice Department lawyer primarily because "[t]he entire business of the computer industry has so completely changed and has developed so extensively since 1955 that the court cannot believe any information obtained by Mr. Hoffman . . . can possibly be of any value or use in connection with this case." *Id.* at 147.

[5] The Government states, "Mississippi *now* represents . . . that its attorney has offered to screen himself from the other members of his firm . . . ." Motion to Affirm at 10 n.4 (emphasis added). The implication that Mississippi has not presented this option to either the district court or to the Government is incorrect. In a letter dated March 20, 1980 to Drew S. Days, III, Assistant Attorney General for Civil Rights, Mr. Leonard's partner, Brian P. Gettings, stated:

> While we do not agree that there is sufficient ground for total disqualification, . . . we believe that a mutually acceptable solution to the problem may be achieved through continuation of the screening of Mr. Leonard, which has existed since the issue was raised, from all involvement in the pending lawsuit, a procedure commonly referred to in the profession as building a "Chinese wall."
>
> . . . .

[Footnote continued on page 5]

Based upon the foregoing reasons, as well as those set out in the Jurisdictional Statement, this Court should deny the Government's Motion to Affirm.

Respectfully submitted,

/s/ Charles Morgan, Jr.

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[5] [Continued]

You have our assurance that Mr. Leonard will be fully insulated from all aspects of the present case.

In a letter to Mr. Gettings dated March 27, 1981, Mr. Days rejected any use of a screen "under the circumstances with which we are presented." Mr. Days did not question the adequacy of the screening procedures implemented by Mr. Leonard's firm. Indeed, at no point until its Motion to Affirm has the Government ever questioned the adequacy of such screening procedures.

Finally, throughout the litigation, Mississippi and Mr. Leonard have proposed screening as an alternative to disqualification of Mr. Leonard and his law firm. *See* Jurisdictional Statement at 24 n.29; Memorandum in Opposition to Defendants' Motion for Order Disqualifying Plaintiff's Counsel at 13 n.1.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 1981, I caused three copies of Appellant's Brief in Opposition to Motion to Affirm to be deposited in the mail, first-class postage prepaid, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Edward Ashworth
EDWARD ASHWORTH